

The UK House of Lords

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In a federation the common justification for a second chamber is that the interests of members of the federation should be protected from the federal level of government. This argument does not apply in the UK. However there are other considerations that justify a second chamber in the UK, in particular the need for 'sober second thoughts' and consideration of constitutional and other wider issues that arise in the legislative process.

The UK does not have a codified entrenched constitution and thus – unlike many liberal democracies – the UK does not have a supreme court with power to strike down or declare unconstitutional laws that are contrary to the constitution, human rights and so on. Instead the system relies heavily on intra-parliamentary mechanisms for upholding constitutional principles and human rights. In this respect it is not unique: the UK resembles Finland. Until recently there was no judicial constitutional review in Finland. Instead the highly respected, expert Committee for Constitutional Law in the unicameral parliament scrutinises bills for constitutionality.

Such intra-parliamentary mechanisms do not, and cannot, operate in the UK House of Commons because it is highly partisan and party political. The Commons are for the most part not interested in the technicalities of the legislative process but in the rough and tumble of party politics and nursing their constituencies – a side effect of the single member constituency system.

Intra-parliamentary scrutiny does however operate very effectively in the UK, in the less partisan, expert House of Lords. This is because of the differences in composition of the two chambers: the second chamber does not normally have a majority from the government party or parties, so it is never a 'rubber stamp'. Nor does the opposition have a majority in the Lords. And the House is prevented from obstructing the government too much by the fact that its members realise that the Commons has electoral legitimacy while theirs do not; they only have a delaying power of one year over most bills. This recognition is implicit in some of the conventions in favour of the Government having its business dealt with promptly in the Lords, and to an extent the Salisbury Convention according to which the Lords will not oppose at second reading bills that were promised in the election manifesto of the government party. (This does not work in a coalition.)

Composition and Legitimacy of the House of Lords

The composition of the UK House of Lords differs in every possible way from that of the House of Commons. All of the members of the latter are elected on the first past the post/plurality system. The government is usually formed by whoever can command a majority in the House of Commons. By contrast none of the members of the House of Lords is elected. Some 92 are hereditary peers. 26 are bishops and

archbishops of the Church of England (the established church in England, but not in Scotland, Wales or Northern Ireland). And the rest of the members – some 650 in all – are life peers, appointed by the Queen on the advice of the Prime Minister of the day. Recent Prime Ministers have accepted that new appointments should promote proportionality as between the parties in the House according to votes cast in the most recent election. Some 20% of members of the House of Lords are independents (cross benchers). The Lords are paid a per diem allowance for attendance. Many of them hardly ever attend.

The active membership – some 450 – includes many elder statesmen, retired judges, people who have had their careers in the voluntary or public sector, members of most professions, philosophers, etc. The chamber is more diverse than the Commons, having a higher proportion of active female members, disabled people, members of ethnic minorities and adherents to minority religions.

While the current unelected composition of the Lords is controversial and difficult to justify rationally, it is widely agreed across the political spectrum that the Chamber discharges its functions in legislative scrutiny and examination of public policies well. It is agreed that, if reformed by introducing elections, the second chamber ought not to be based on the same system as the Commons – first past the post. A form of proportional representation should be used. It is also agreed that the Commons should enjoy primacy over the Lords: this means that the Lords should not have the power to frustrate the government except by delaying the passing of legislation by about a year. This power generally allows for the government of the day and the Commons to have ‘sober second thoughts’. It is also agreed that the Lords should not have a majority for a party in opposition. And the Lords should not have electoral legitimacy that challenges the Commons.

Two questions then arise: How then can the Lords claim, or be granted, legitimacy in a representative democracy like the UK? And how, if at all, can it be reformed?

First, it should be noted that unelected, non-political bodies play important roles in the legislative processes in many democracies: obvious examples are the French Conseil d’Etat and similar bodies in other countries, including Italy. The French Conseil Constitutionnel also has important roles in protecting the Constitution before a projet de loi is promulgated by the President. Such bodies derive their legitimacy from the constitutional or legislative mandate that they have, and from the very fact that they are politically independent and expert. These are examples of possible sources of legitimacy apart from election. The House of Lords can claim relative independence and non-partisan approach when scrutinising bills and draft bills, and members with expertise and experience which they bring to bear to those activities. Legitimacy can derive from the quality of a body’s work. Expert, impartial scrutiny of bills and draft bills and government policies, particularly in relation to constitutional issues (the work of the Constitution Committee of the House of Lords), the delegation of legislative powers (the Delegated Powers and Regulatory Reform Committee) and human rights (the Joint Committee on Human Rights) are important parts of the legislative process in any democracy and should be performed in non-partisan ways by those with expertise and experience.

Furthermore the Lords' power is limited to amending bills, and to delay their passing into law by a year: they do not exercise veto powers. The lack of election is therefore less of an objection to this Chamber than it would be to unelected chambers with veto powers.

In practice the House of Lords does not compromise rule by the government and the majority which it commands in the House of Commons. The second chamber in the UK can delay legislation for about a year only.

Reform of the House of Lords?

Successful reform of the House of Lords can only succeed if the government, the parties and the Commons appreciate the importance of the work the Lords do and their own inevitable shortcomings in these respects: currently they do not.

The main issue in the UK is whether the second chamber should be wholly or partly elected. Attempts have been made in recent years to introduce election to the membership: all have failed. The problem is here that election could challenge the primacy of the Commons, on which the smooth operation of the political system depends. And elected members are unlikely to have the skills, expertise and above all relatively non-partisan attitudes which are required for the second chamber to continue to do its valuable work of expert scrutiny of bills and debate of public policy. If the UK had a Conseil d'Etat, or a codified entrenched constitution instituting a supreme court with power to strike down unconstitutional laws, things would be different. But it does not, and is unlikely to in the foreseeable future.

Meanwhile incremental reform have taken place recently, and will continue. The House of Lords Reform Act 1999 removed all but 92 hereditary peers. This dealt with problems of over-representation of Conservatives in the House, and its size – still by far the largest second chamber among democracies (though many members do not attend, and many are only part time.) The House of Lords Reform Act 2014 enabled peers to retire, removed those who do not fulfil minimum attendance requirements and those convicted of serious criminal offences (of whom there have been very few). This is unlikely to result in the House becoming much smaller.

Further reforms would be positive, such as transferring the nomination of new peers from the Prime Minister to a statutory appointments commission that would work to explicit criteria, including decreasing the size of the chamber, and achieving party balance, independence, diversity and expertise.

